Supreme Court, U.S.
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In The OFFICE OF THE CLERK

Supreme Court of the United States

RICHARDSON CONSTRUCTION INC.;
HARTFORD FIRE INSURANCE COMPANY; and
HARTFORD ACCIDENT AND INDEMNITY COMPANY,

Petitioners,

v.

TRUSTEES OF THE CONSTRUCTION INDUSTRY AND LABORERS HEALTH AND WELFARE TRUST; TRUSTEES OF THE CONSTRUCTION INDUSTRY AND LABORERS JOINT PENSION TRUST; and TRUSTEES OF THE CONSTRUCTION INDUSTRY AND LABORERS VACATION TRUST AND TRUSTEES FOR THE SOUTHERN NEVADA LABORERS LOCAL 872 TRAINING TRUST,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

THEODORE PARKER, III
PARKER, NELSON & ARIN, CHTD.
7201 Lake Mead Boulevard
Suite 208
Las Vegas, Nevada 89128

DAVID N. FREDERICK
Counsel of Record
TODD E. KENNEDY
G. LANCE COBURN
LIONEL SAWYER & COLLINS
300 So. Fourth Street
#1700
Las Vegas, Nevada 89101
(702) 383-8888

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. Does a federal district court possess both constitutional and statutory jurisdiction under 28 U.S.C. § 1367(a) over a state-law claim against a party over which the district court would not otherwise have jurisdiction after entry of a default judgment prior to trial fully resolving the federal claim that gave the district court original jurisdiction of the case?

II. If a federal district court possesses jurisdiction under the circumstances described in Question I, does the district court have discretion to dismiss the state-law claim against the pendent party after entry of a default judgment fully resolving the federal claim prior to trial, in the interests of comity as well as judicial economy, convenience, and fairness?

CORPORATE DISCLOSURE STATEMENT

Richardson Construction, Inc., is a corporation that does not have a parent corporation.

Hartford Fire Insurance Company and Hartford Accident & Indemnity Company are publicly traded corporations.

ADDITIONAL PARTIES TO THE LITIGATION BELOW

In addition to Petitioners and Respondents, the following persons and entities are or were parties to the litigation below: Desert Valley Landscape & Maintenance, Inc.; Rich Manuli, Jr.; Richard Manuli; M&H Enterprises, Inc.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, RICHARDSON CONSTRUCTION, INC., HARTFORD FIRE INSURANCE COMPANY and HARTFORD ACCIDENT & INDEMNITY COMPANY, respectfully pray that a writ of certiorari issue to review the decision and opinion of the United States Court of Appeals for the Ninth Circuit in the litigation below.

OPINIONS BELOW

The order denying rehearing and rehearing en banc and amended decision and Opinion of the Ninth Circuit is reported at *Trustees of Construction Industry and Laborers Health and Welfare Trust v. Desert Valley Landscape & Maintenance, Inc.*, 333 F.3d 923 (9th Cir. 2003), and is reprinted in the Appendix ("App.") hereto at page App. 1. The underlying order of the United States District Court for the District of Nevada that was reversed by the Ninth Circuit is unpublished and is reprinted in the Appendix hereto at page App. 8.

JURISDICTION

The Ninth Circuit's decision was first issued as an unpublished memorandum disposition on April 24, 2003. Petitioners' timely petition for rehearing and rehearing en banc was denied, and the memorandum disposition, as amended, was issued and entered as a published decision and Opinion, on June 23, 2003. The Court has jurisdiction under 28 U.S.C. § 1254(1), and the petition is timely under Supreme Court Rule 13.1.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

Article III, Section 2, Clause 1 of the Constitution of the United States provides as follows:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a party; – to Controversies between two or more States; – between a State and Citizens of another State; – between Citizens of different States; – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

The Tenth Amendment to the Constitution of the United States provides as follows:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

28 U.S.C. § 1367 provides, in relevant part, as follows:

> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction

that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

* * *

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if –

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

29 U.S.C. § 1132 provides, in relevant part, as follows:

(a) a civil action may be brought – . . .

* * *

(3) by a . . . fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provision of this title or the terms of the plan; . . .

* * *

> (e)(1) . . . the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought . . . by a . . . fiduciary . . .
>
> (f) The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

Nev. Rev. Stats (NRS) § 608.150(1) provides as follows:

> Every original contractor making or taking any contract in this state for the erection, construction, alteration or repair of any building or structure, or other work, shall assume and is liable for the indebtedness for labor incurred by any subcontractor or any contractors acting under, by or for the original contractor in performing any labor, construction or other work included in the subject of the original contract, for labor, and for the requirements imposed by chapters 616A to 617, inclusive, of NRS.

STATEMENT OF THE CASE

Respondents, trustees of various union trust funds governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), filed suit under 29 U.S.C. § 1132(a)(3), in the District Court below, against Desert Valley Landscape & Maintenance, Inc., a subcontractor on a southern Nevada construction project, seeking recovery of contributions allegedly due the trust funds from Desert Valley under the terms of the collective bargaining agreements between Desert Valley and the unions. Later, Respondents

amended their pleadings to assert claims against Petitioner Richardson Construction, Inc., the general contractor on the project (and its sureties, Hartford Fire Insurance Company and Hartford Accident & Indemnity Company), under Nev. Rev. Stats. (NRS) § 608.150(1), seeking recovery of the contributions allegedly owed by Desert Valley to the trust funds.

Shortly before trial, the District Court entered a default judgment against Desert Valley, fully resolving Respondents' federal claims against Desert Valley in Respondents' favor. Petitioners then moved to dismiss Respondents' remaining state-law claims against Petitioners for lack of subject matter jurisdiction. The District Court granted the motion, and Respondents appealed to the Ninth Circuit.

The District Court observed that this Court has never squarely addressed the question of the constitutionality of pendent party jurisdiction, but that the Ninth Circuit's decision in *Ayala v. United States*, 550 F.2d 1196 (9th Cir. 1977), *cert. granted*, 434 U.S. 814 (1977), *cert. dismissed*, 435 U.S. 982 (1978), and district court decisions following *Ayala*, supported Petitioners' "argument that Article III does not permit the exercise of supplemental federal jurisdiction over [d]efendants who are not parties to the federal claim, under the particular circumstances presented here." App. 10. The District Court then continued: "Moreover, to the extent [Respondents] are correct in their contention that [the District] Court has only the option to consider declining supplemental jurisdiction under 28 U.S.C. § 1367(c), the [District] Court concludes that in accord with 28 U.S.C. § 1367(c)(3), [the District] Court should in fact exercise its discretion to decline jurisdiction in this case." *Id.* Citing *United Mine Workers [of America]*

v. Gibbs, 383 U.S. 715, 726-727 (1966) for the proposition that "the exercise of supplemental jurisdiction should be rare when all federal claims have been dismissed before trial," the District Court concluded: "What remains here is a claim by [Respondents] under state law which, in the judgment of [the District] Court, properly belongs before a state court." App. 10-11.

The Ninth Circuit reversed. First, the Ninth Circuit rejected Petitioners' constitutional argument, citing *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163, 1174 (9th Cir. 2002), decided after the District Court's decision below.[1] App. 3-4. The Ninth Circuit then held that the District Court did not have discretion to dismiss Respondents' state-law claims under 28 U.S.C. § 1367(c)(3) because their federal claim was not dismissed as unfounded but resolved in Respondents' favor by a default judgment. App. 4-6. Finally, the Ninth Circuit asserted that "even if the district court had the authority to exercise discretion and decline jurisdiction, it did not further the objectives of fairness and efficiency to do so." App. 6. The Ninth Circuit did not consider the question of comity and, citing the District Court's reference to 28 U.S.C. § 1367(c)(3) in its order, the Ninth Circuit refused to address whether dismissal of the state-law claims was warranted under 28

[1] In *Mendoza*, the Ninth Circuit referred to statements in this Court's later decisions, including *Finley v. United States*, 490 U.S. 545, 549 (1989) and particularly, *Raynoor v. Regents of the University of Minnesota*, 534 U.S. 533, ___, 122 S.Ct. 999, 1004-1005 (2002), in holding that "any suggestion in *Ayala* that the Constitution imposes a bar on supplemental jurisdiction over additional parties independent of statutory authorization has been undermined by intervening Supreme Court authority." 301 F.3d at 1172-1174.

U.S.C. § 1367(c)(1) because "the claim raises a novel or complex issue of State law," or under 28 U.S.C. § 1367(c)(2) because "the claim substantially predominates over the claim or claims over which the district court has original jurisdiction," after entry of the default judgment resolving the federal claims before trial. App. 4-5, n.1.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decision in the litigation below holds that the District Court lacked discretion to dismiss Respondents' state-law claims under 28 U.S.C. § 1367(c)(3), because the statute only permits dismissal of state-law claims where the district court has "dismissed all claims over which it has original jurisdiction," and in this case, the District Court entered a default judgment resolving Respondents' federal claims in their favor. The Ninth Circuit's holding conflicts with district court decisions in at least two other circuits. *See, Fitzpatrick v. Winn-Dixie Montgomery, Inc.*, 153 F. Supp. 2d 1303, 1306-1307 (M.D. Ala. 2001) (state-law claims against employer dismissed after default judgment entered on plaintiff's federal claim against employee co-defendant); *Boyd v. Herron*, 39 F. Supp. 2d 1129, 1131-1132 (N.D. Ind. 1999) (state-law *respondeat superior* claim dismissed after entry of default on plaintiff's federal claim against co-defendants).

Moreover, the Ninth Circuit's rationale is in harmony with the Second Circuit's decision in *Itar-Tass Russian News Agency v. Russian Kurier*, 140 F.3d 442, 445-448 (2d Cir. 1998), and the Eighth Circuit's decision in *McLaurin v. Prater*, 30 F.3d 982, 984-985 (8th Cir. 1994), but in

conflict with the District Court for the Eastern District of Wisconsin's decision in *Milwaukee Prof. Fire Fighters v. City of Milwaukee*, 869 F.Supp. 633, 650 (E.D. Wisc. 1994) (state-law claims dismissed after plaintiffs granted judgment on the merits on their federal claims). Finally, the Ninth Circuit's decision is one of a number of decisions evidencing widespread disagreement among the circuits on the question whether the enactment of 28 U.S.C. § 1367 substantially narrowed the discretion of federal courts to dismiss pendent state-law claims under the Court's decision in *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726-727 (1966). *See, e.g., Itar-Tass Russian News Agency v. Russian Kurier, supra*, 140 F.3d at 446-447 (cataloging circuit court decisions); *see also, McClelland v. Gronwaldt*, 155 F.3d 507, 519-521 (5th Cir. 1998); *Shanaghan v. Cahill*, 58 F.3d 106, 108-112 (4th Cir. 1995); *cf., Musson Theatrical, Inc. v. Federal Exp. Corp.*, 89 F.3d 1244, 1254-1257 (6th Cir. 1996), *amended on denial of rehearing*, 1998 WL 117980 (6th Cir. 1998).

I. THE COURT SHOULD GRANT THE WRIT TO RESOLVE THE QUESTION WHETHER FEDERAL COURTS POSSESS BOTH CONSTITUTIONAL AND STATUTORY JURISDICTION OVER PENDENT PARTIES AFTER ENTRY OF A JUDGMENT RESOLVING PLAINTIFFS' FEDERAL CLAIM BEFORE TRIAL

The litigation below is founded upon federal question jurisdiction. Consequently, unless the District Court possesses constitutional as well as statutory jurisdiction under 28 U.S.C. § 1367 after entry of a judgment resolving the federal claims before trial, its dismissal of the pendent

claim was not a matter of discretion. *Cf. Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 491-492 (1983).

Article III, Section 2 of the United States Constitution empowers Congress to give the federal courts jurisdiction over "Cases" that arise under Federal law and "Controversies . . . between Citizens of different States." *Id.* In *United Mine Workers of America v. Gibbs*, *supra*, the Court held that federal courts have the power to resolve a state claim whenever there is a federal claim "and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.' . . . The state and federal claims must derive from a common nucleus of operative fact" and must be such that the plaintiff "would ordinarily be expected to try them all in one judicial proceeding. . . . " 383 U.S. at 725 (footnotes omitted). Since Article III defines the parameters of federal question jurisdiction in terms of cases, not claims, and as the Court has long recognized, cases arising under federal law may include state-law claims, *see Verlinden B.V. v. Central Bank of Nigeria*, *supra*, 461 U.S. at 491-492, citing *Osborn v. Bank of the United States*, 9 Wheat. 738 (1824), the Court's holding in *Gibbs* presents no conflict with the language of Article III.

On the other hand, Article III defines the parameters of diversity jurisdiction in terms of controversies, not cases, and (as relevant here) only gives the federal courts jurisdiction of controversies between citizens of different States. Therefore, a holding that a case arising under federal law also may encompass a state-law controversy between citizens of the same state arguably conflicts with the language of Article III and the Constitution's Tenth Amendment, reserving to the states the judicial powers

not delegated to the federal courts in the Constitution. *See Aldinger v. Howard*, 427 U.S. 1, 13-15 (1976); *Ayala v. United States*, *supra*, 550 F.2d at 1199-1200. The Court has suggested that the power of a federal court to exercise pendent party jurisdiction confronts "a more serious obstacle" than the exercise of pendent-claim jurisdiction, *Aldinger v. Howard*, *supra*, 427 U.S. at 18, and is "a subtle and complex question with far-reaching implications," *Moor v. County of Alameda*, 411 U.S. 693, 715 (1973), but has found it unnecessary to decide the question on several occasions. *See Moor v. County of Alameda*, *supra*; *Aldinger v. Howard*, *supra*; *Owen Equipment and Erection Co. v. Kroger*, 437 U.S. 365 (1978); *Finley v. United States*, 490 U.S. 545 (1989). In *Raynoor v. Regents of University of Minnesota*, 534 U.S. 533, ___, 122 S.Ct. 999, 1004-1005 (2002) the Court observed that the enactment of 28 U.S.C. § 1367 provided statutory authority for pendent party jurisdiction that the Court had found lacking in its prior decisions, but did not address the Article III question.

The entry of a default judgment resolving Respondents' federal claims prior to trial sharpens the focus of this question here. In *Aldinger* and *Kroger*, the Court recognized that pendent party jurisdiction involves the Court's ancillary jurisdiction precedents, 427 U.S. at 9-13; 437 U.S. at 375-377, and in *Peacock v. Thomas*, 516 U.S. 349, 354-359 (1996), the Court held that ancillary jurisdiction does not extend to a separate action to impose an obligation to pay an existing federal judgment on a party not already liable for the judgment. *Id.*, relying on *H.C. Cook Co. v. Beecher*, 217 U.S. 497 (1910). Circuit court decisions disagree on whether a different result is called for where such a claim is brought in the original case in which the judgment was obtained. *Compare*, *U.S.I.*

Properties Corp. v. M.D. Construction Co., 230 F.3d 489, 496-501 (1st Cir. 2000) (*Peacock* applicable to supplemental proceedings in original case) with *Wilson v. City of Chicago*, 120 F.3d 681, 683-684 (7th Cir. 1997) (*Peacock* does not preclude joinder of additional party in original case); *see also*, *Epperson v. Entertainment Express, Inc.*, 242 F.3d 100, 103-107 (2d Cir. 2001) (distinguishing between collecting a judgment and imposing liability for a judgment on a third party for ancillary jurisdiction purposes). The finality considerations embodied in Fed. R. Civ. P. 54(b) also might suggest a different result in multiple-claim, multiple-party cases but for the established principle that neither Congressional statutes nor court rules can extend the jurisdiction of the federal courts beyond the limits imposed by Article III. *Verlinden B.V. v. Central Bank of Nigeria*, *supra*, 461 U.S. at 491; *Owen Equipment and Erection Co. v. Kroger*, *supra*, 437 U.S. at 370; Fed. R. Civ. P. 82.

Therefore, the Court should grant the writ to resolve the question whether federal courts possess both constitutional and statutory jurisdiction where only a state-law claim between citizens of the same state remains in the case after entry of a default judgment resolving the federal claim before trial.[2] *Cf. Rosado v. Wyman*, 397 U.S. 397, 405

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[2] In *New Rock Asset Partners v. Preferred Entity Advancements*, 101 F.3d 1492 (3d Cir. 1996), a majority of the panel observed that the rule developed in diversity cases that jurisdiction is determined at the outset of the action "has been applied only rarely to federal question cases," and then often "without extensive discussion or analysis." 101 F.3d at 1503-1504. The majority held that, once the Resolution Trust Corporation ("RTC") was dismissed from the case, 12 U.S.C. § 1441a(l)(1) no longer provided federal jurisdiction. 101 F.3d at 1497-1504. Nevertheless, the majority then held that 28 U.S.C. § 1367

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(1970) ("We are not willing to defeat the commonsense policy of pendent jurisdiction – the conservation of judicial energy and the avoidance of multiplicity of litigation – by a conceptual approach that would require jurisdiction over the primary claim at all stages as a prerequisite to resolution of the pendent claim.") (footnote omitted); *United Mine Workers of America v. Gibbs*, *supra*, 383 U.S. at 727 ("The question of power will ordinarily be resolved on the pleadings. But the issue whether pendent jurisdiction has been properly assumed is one which remains open throughout the litigation. . . . Once it appears that a state claim constitutes the real body of a case, to which the federal claim is only an appendage, the state claim may fairly be dismissed.").

II. THE COURT SHOULD GRANT THE WRIT TO RESOLVE THE QUESTION WHETHER FEDERAL COURTS HAVE DISCRETION TO DISMISS PENDENT CLAIMS AFTER ENTRY OF A JUDGMENT RESOLVING PLAINTIFFS' FEDERAL CLAIMS BEFORE TRIAL

In *United Mine Workers of America v. Gibbs*, *supra*, the Court went on to hold that pendent jurisdiction "need not be exercised in every case in which it is found to exist," because "pendent jurisdiction is a doctrine of discretion, not of plaintiff's right." 383 U.S. at 726. Specifically, the

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continued to provide supplemental jurisdiction over state-law claims and that such jurisdiction did not offend either Article III or the statutory language. 101 F.3d at 1504-1511. The dissent concluded the majority could not have it both ways, asserting that, if the district court lost federal jurisdiction, it also lost supplemental jurisdiction. 101 F.3d at 1511-1515.

Court held that, if "considerations of judicial economy, convenience and fairness to litigants . . . are not present a federal court should hesitate to exercise jurisdiction over state claims. . . . " *Id.* Furthermore, the Court also held that "if the federal claims are dismissed before trial. . . . the state claims should be dismissed as well," because:

> Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law.

Id. (footnote omitted). *Cf. Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 350 n.7 (1988) (*Gibbs* "does not establish a mandatory rule to be applied inflexibly in all cases," but "simply recognizes that in the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered . . . will point toward declining to exercise jurisdiction over the remaining state-law claims."); *Rosado v. Wyman, supra*, 397 U.S. at 403-405 (pendent jurisdiction properly exercised when federal claim dismissed on mootness grounds after hearings and argument).

As noted, there is widespread disagreement among the circuits on whether the enactment of 28 U.S.C. § 1367 substantially narrowed the discretion of federal courts to dismiss pendent claims under *Gibbs*. *See Itar-Tass Russian News Agency v. Russian Kurier, supra*, 140 F.3d at 446-447 (and cases cited therein). Some circuits point to legislative history suggesting the statute was intended to codify, not alter, pendent jurisdiction as established by the courts under *Gibbs*. *See, e.g., Brazinski v. Amoco Petroleum Additives Co.*, 6 F.3d 1176, 1181-1182 (7th Cir. 1993); *accord, Shanaghan v. Cahill, supra*; *Rodriguez v. Doral Mortg. Corp.*, 57 F.3d 1168, 1175-1179 (1st Cir. 1995);

Edmondson & Gallagher v. Alban Towers Tenants Ass'n, 48 F.3d 1260, 1265-1267 (D.C. Cir. 1995); *see also*, *Musson Theatrical, Inc. v. Federal Exp. Corp.*, *supra*, 89 F.3d at 1254-1257. Other circuits, including the Ninth Circuit, point to the mandatory language of Section 1367(a) and the discretionary language of Section 1367(c) and conclude that federal courts now have no discretion to dismiss pendent claims unless the circumstances fall within one of the four subsections of Section 1367(c). *See, e.g.*, *Executive Software No. Am. v. U.S. Dist. Ct.*, 24 F.3d 1545, 1551-1560 (9th Cir. 1994); *accord*, *Itar-Tass Russian News Agency v. Russian Kurier*, *supra*, 140 F.3d at 447-448; *McLaurin v. Prater*, *supra*, 30 F.3d at 984-985; *see also*, *Baggett v. First Nat. Bank of Gainesville*, 117 F.3d 1342, 1352-1353 (11th Cir. 1997). At least one circuit has concluded federal courts are to consider both the statutory factors and the *Gibbs* factors in deciding whether to dismiss or retain pendent claims. *See McClelland v. Gronwaldt*, *supra*, 155 F.3d at 519.

In its decision below, the Ninth Circuit held that the District Court did not have discretion to dismiss the pendent claims under 28 U.S.C. § 1367(c)(3) after entry of a default judgment resolving the federal claims before trial, because the federal claim was not dismissed as unfounded but resolved in Respondents' favor. Moreover, the Ninth Circuit then held that, if the District Court had discretion, dismissal of the state-law claim was an abuse of discretion because "it did not further the objectives of fairness and efficiency to do so." App. 6. The Ninth Circuit did not consider whether the state-law claim "substantially predominates" over the federal claim under 28 U.S.C. § 1367(c)(2) after entry of a default judgment resolving the federal claim before trial. The Ninth Circuit

also acknowledged that "[s]ection 1367(c)(3) derives from *Gibb's* admonition that '[n]eedless decisions of state law should be avoided,' 383 U.S. at 726", App. 5, but nevertheless gave no consideration to whether dismissal was warranted in the interests of comity before finding dismissal was an abuse of discretion. *Cf. Baggett v. First National Bank of Gainesville, supra*, 117 F.3d at 1353.

In *Carnegie-Mellon University v. Cohill*, 484 U.S. 353, 348-357 (1988), decided before enactment of 28 U.S.C. § 1367, the Court observed that "in the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine – judicial economy, convenience, fairness, and comity – will point toward declining to exercise jurisdiction over the remaining state-law claims." 484 U.S. at 350 n.7. The Court then held that, where the case has been removed from state court, district courts are not limited to dismissal, but have discretion to remand pendent claims to state court if it would better satisfy the *Gibbs* factors, even though no statute expressly authorizes such a remand. 484 U.S. at 351-357. In *City of Chicago v. Intern. College of Surgeons*, 552 U.S. 156, 164-165, 172-173 (1997), decided after enactment of 28 U.S.C. § 1367, the Court repeated its observation in *Gibbs* that pendent jurisdiction "is a doctrine of discretion, not of plaintiff's right," and characterized the statute as having codified the principles stated in *Gibbs* and *Cohill*, but also stated that "the statute confirms the discretionary nature of supplemental jurisdiction by enumerating the circumstances in which district courts can refuse its exercise," then quoting 28 U.S.C. § 1367(c). 522 U.S. at 172-173.

Cohill establishes that the Judicial Branch is not limited to strict compliance with the literal wording of

Congressional statutes in its discretionary disposition of state-law claims, where all federal claims "are eliminated before trial." 484 U.S. at 350 n.7. Thus, the Court should grant the writ to resolve the question whether district courts have discretion to dismiss pendent claims after entry of a default judgment resolving all federal claims before trial in the interests of comity as well as judicial economy, convenience and fairness to the litigants. *Cf. Cohill*, 484 U.S. at 350 ("Under *Gibbs*, a federal court should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness and comity in order to decide whether to exercise jurisdiction over a case brought in that court involving pendent state-law claims.").

CONCLUSION

For these reasons, a writ of certiorari should be granted.

Respectfully submitted,

DAVID N. FREDERICK
Counsel of Record
TODD E. KENNEDY
G. LANCE COBURN
LIONEL SAWYER & COLLINS
300 So. Fourth Street
#1700
Las Vegas, Nevada 89101
(702) 383-8888

THEODORE PARKER, III
PARKER, NELSON & ARIN, CHTD.
7201 Lake Mead Boulevard,
Suite 208
Las Vegas, Nevada 89128
(702) 838-8600

Attorneys for Petitioners

APPENDIX

333 F.3d 923

United States Court of Appeals,
Ninth Circuit.

TRUSTEES OF THE CONSTRUCTION INDUSTRY AND LABORERS HEALTH AND WELFARE TRUST; Trustees of the Construction Industry and Laborers Joint Pension Trust; Trustees of the Construction Industry and Laborers Vacation Trust; Trustees for the Southern Nevada Laborers Local 872 Training Trust, Plaintiffs-Appellants,

v.

DESERT VALLEY LANDSCAPE & MAINTENANCE, INC., Defendant,

and

Hartford Fire Insurance Company; Rich Manuli, Jr.; Richard Manuli,
Defendants-Appellees.

Construction Industry Pension; Construction Industry/Laborers Joint Trustees; Construction Industry/Laborers Vacation Trustees,
Plaintiffs-Appellees,

v.

Hartford Accident & Indemnity Company; Hartford Fire Insurance Company; Richardson Construction, Inc., Defendants-Appellants,

and

Rich Manuli, Jr.; M & H Enterprises, Inc., Defendants. Trustees of the Construction Industry and Laborers Health and Welfare Trust; Trustees of the Construction Industry and Laborers Joint Pension Trust; Trustees of the Construction Industry And Laborers Vacation Trust; Trustees for the

Southern Nevada Laborers Local 872 Training Trust, Plaintiffs-Appellants,

v.

Desert Valley Landscape Maintenance, Inc., Defendant,

and

Hartford Fire Insurance Company; Rich Manuli, Jr.; Richard Manuli, Defendants-Appellees.

Nos. 02-15152, 02-15204, 02-15831.

Argued and Submitted March 11, 2003.
Order Filed June 23, 2003.
Opinion Filed April 24, 2003.

Adam P. Segal and Michael A. Kristof, Schreck Brignone, Las Vegas, NV, for the plantiffs-appellants-cross-appellees.

Theodore Parker, III, Parker Nelson & Arin, CHTD, Las Vegas, NV, for the defendants-appellees-cross-appellants.

Appeals from the United States District Court for the District of Nevada; Philip M. Pro, District Judge, Presiding. D.C. No. CV-98-01246-PMP.

Before: KOZINSKI, GRABER and BERZON, Circuit Judges.

ORDER AND OPINION

ORDER

Appellants' request to publish the unpublished memorandum disposition is granted. The memorandum disposition filed April 24, 2003, as amended, is hereby redesignated an authored opinion by Judge Berzon and is filed concurrently herewith.

Appellees' panel petition for rehearing and petition for rehearing with suggestion for rehearing en banc are denied. No further petitions for rehearing will be entertained.

OPINION

BERZON, Circuit Judge.

The district court dismissed the supplemental state law claims of the Trustees of the Construction Industry and Laborers Health and Welfare Trust, et al. ("Trustees") against Richardson Construction, Inc. and its sureties, Hartford Accident and Indemnity Company and Hartford Fire Insurance Company (collectively "Richardson"), for two reasons: It doubted that supplemental jurisdiction was constitutional and, to the extent that it was constitutional, declined to exercise supplemental jurisdiction under 28 U.S.C. § 1367(c)(3) because it had previously granted default judgment in favor of Trustees on their federal claims. We review de novo the issue whether the district court had supplemental jurisdiction. *See Hoeck v. City of Portland,* 57 F.3d 781, 784 (9th Cir.1995). We review for abuse of discretion the district court's decision to decline supplemental jurisdiction. *See Bryant v. Adventist Health Sys./W.,* 289 F.3d 1162, 1165 (9th Cir.2002). We reverse.

1. Supplemental jurisdiction is constitutional so long as the pendent state law claim is part of the same "case or controversy" as the federal claim. *See Mendoza v. Zirkle Fruit Co.,* 301 F.3d 1163, 1174 (9th Cir.2002); 28 U.S.C. § 1367(a) (providing "the district courts shall have supplemental jurisdiction over all other claims that are so related to [federal claims] that they form part of the same case or controversy under Article III"). Nonfederal claims

are part of the same "case" as federal claims when they "'derive from a common nucleus of operative fact' and are such that a plaintiff 'would ordinarily be expected to try them in one judicial proceeding.'" *Finley v. United States,* 490 U.S. 545, 549, 109 S.Ct. 2003, 104 L.Ed.2d 593 (1989) (quoting *United Mine Workers of Am. v. Gibbs,* 383 U.S. 715, 725, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966)).

The state law claims here are part of the same constitutional case as Trustees' federal claims, filed under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(a)(3) (1999), against Richardson's subcontractor – Desert Valley Landscape and Maintenance, Inc. ("Desert Valley") – the entity that performed the work in question. The debt that Trustees seek to recover from Richardson under Nevada Revised Statute 608.150 is the same ERISA-related debt that Trustees also sought to recover from Desert Valley. Richardson planned to argue as part of its equitable estoppel defense that Desert Valley did not in fact owe any ERISA contributions. Thus, the issue of Desert Valley's ERISA obligations would have been part of the trial on Richardson's state law obligation to answer for Desert Valley's debts. Supplemental jurisdiction was therefore constitutional.

2. The district court also, in the alternative, invoked its discretion under 28 U.S.C. § 1367(c)(3) and declined to exercise jurisdiction.[1] To decline jurisdiction under

[1] Section 1367(c) provides that:

> The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if (1) the claim raises a novel or complex issue of State law, (2) the claim substantially predominates over the claim or claims over

(Continued on following page)

§ 1367(c)(3), the district court must first identify the dismissal that triggers the exercise of discretion and then explain how declining jurisdiction serves the objectives of economy, convenience and fairness to the parties, and comity. *See Executive Software N. Am., Inc. v. United States Dist. Court,* 24 F.3d 1545, 1557 (9th Cir.1994).

Section 1367(c)(3) derives from *Gibbs's* admonition that "[n]eedless decisions of state law should be avoided." 383 U.S. at 726, 86 S.Ct. 1130; *Executive Software,* 24 F.3d at 1556 ("Subsection [sic] (c)(2) . . . and (c)(3) . . . are derived directly from *Gibbs* itself . . . ."); H.R.Rep. No. 101-734, at 29 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6875. *Gibbs* recognized that a complaint making an "unfounded claim of federal right" might nonetheless provide a federal court the opportunity to determine an issue of state law. *See Strachman v. Palmer,* 177 F.2d 427, 433 (1st Cir.1949) (Magruder, C.J., concurring), cited in *Gibbs,* 383 U.S. at 726 n. 15, 86 S.Ct. 1130. Section 1367(c)(3) reflects this concern by expressly enabling federal courts to avoid determining an issue of state law when the federal claim, on which its jurisdiction rests, proves to be unfounded.

It is thus no surprise that our cases upholding the exercise of discretion under § 1367(c)(3) have all involved

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which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

As the district court purported to exercise the discretion conferred in subsection (c)(3), we limit our discussion to that provision.

dismissals for failure to state a claim or a grant of summary judgment to the defendant on the federal claim. *See, e.g., Bryant,* 289 F.3d at 1165 (summary judgment for defendants on federal claim); *Ove v. Gwinn,* 264 F.3d 817, 821 (9th Cir.2001) (Rule 12(b)(6) dismissal of federal claims). In each case, we held that it was appropriate for the district court to decline jurisdiction over the supplemental state claims because the federal claim had proven to be unfounded.

The district court did not dismiss the federal claim in this case. To the contrary, it granted a default judgment in favor of the plaintiff. Far from determining that the federal claim was unfounded, the court's default judgment represents its determination that the federal claim was well-founded. The simple fact that there was nothing left to litigate on the merits of that claim does not mean that claim was dismissed. As the federal claim here was not dismissed, the exercise of discretion was not authorized by § 1367(c)(3).

Further, even if the district court had the authority to exercise discretion and decline jurisdiction, it did not further the objectives of fairness and efficiency to do so. The district court permitted Trustees to amend their complaint to add the state law claim and then managed the case through another year of discovery, bringing the case into its third year. The court then granted partial summary judgment on the state claim, only to dismiss the case seven days before trial. Dismissing the case after such a long delay and after the parties were essentially done with trial preparation was neither fair to the parties nor an efficient use of judicial resources. The dismissal was therefore an abuse of discretion.

3. Trustees attack the clerk's award of costs to Richardson on several grounds. In light of our decision to reverse the district court's dismissal, there is no longer a final judgment to support that award. It is therefore vacated.

4. Richardson cross-appeals the district court's award of partial summary judgment as to damages in the state law claim. Where a district court erroneously dismisses a case on jurisdictional grounds, our precedents indicate that we should decline to exercise jurisdiction over prior substantive orders that would not themselves support a final judgment. *See Jones-Hamilton Co. v. Beazer Materials & Servs., Inc.*, 973 F.2d 688, 693-94 & n. 2 (9th Cir.1992). We therefore do not reach the propriety of the partial summary judgment. Richardson may, of course, raise the issue in any later appeal of a final judgment on the merits in this case.

CONCLUSION

The judgment of the district court is

REVERSED and REMANDED. Award of costs VACATED.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

TRUSTEES OF THE CONSTRUCTION INDUSTRY AND LABORERS HEALTH AND WELFARE TRUST; TRUSTEES OF THE CONSTRUCTION INDUSTRY AND LABORERS JOINT PENSION TRUST; TRUSTEES OF THE CONSTRUCTION INDUSTRY AND LABORERS VACATION TRUST, Plaintiffs, v. DESERT VALLEY LANDSCAPE & MAINTENANCE, INC., (DESERT VALLEY, INC.), a Nevada corporation, Defendants.	CV-S-98-1246-PMP (RJJ) Base File
TRUSTEES OF THE CONSTRUCTION INDUSTRY AND LABORERS HEALTH AND WELFARE TRUST; TRUSTEES OF THE CONSTRUCTION INDUSTRY AND LABORERS JOINT PENSION TRUST; TRUSTEES OF THE CONSTRUCTION INDUSTRY AND LABORERS VACATION TRUST AND TRUSTEES FOR THE SOUTHERN NEVADA LABORERS LOCAL 872 TRAINING TRUST, Plaintiffs, v. HARTFORD FIRE INSURANCE COMPANY, RICHARDSON CONSTRUCTION, INC., a Nevada corporation, Defendants.	CV-S-00-0309-PMP (RJJ) (Filed Jan. 7, 2002)

Plaintiffs Joint Trust Funds brought this action seeking the payment of allegedly delinquent trust fund contributions due from Defendant Richard Manuli and Desert Valley Landscape & Maintenance. Plaintiffs contend that they are entitled to recover the alleged delinquencies from Richardson Construction, Inc., who was Desert Valley's general contractor, based on Nevada Revised Statute 608.150, a Nevada statute that purports to make general contractors liable for the labor-related debts of their subcontractors. Plaintiffs also contend that Defendant Hartford Fire Insurance Company and Hartford Accident and Indemnity Company are liable for the unpaid contributions as Defendant Richardson's surety. Defendants Richardson, Hartford Fire Insurance Company and Hartford Accident and Indemnity Company deny that they are liable to Plaintiffs for the claimed delinquencies.

On December 18, 2001, Defendants Richardson and Hartford filed an Emergency Motion to Dismiss for Lack of Jurisdiction (#168). Specifically, Defendants contend that in the process of preparing for trial, their research uncovered "irrefutable statutory and case law which prohibits this Court from maintaining supplemental jurisdiction over the state law claim . . . " which remains to be tried in this case. Relying on the recent Opinion of the Ninth Circuit Court of Appeals in *Herman Family Revocable Trust v. Teddy Bear*, 254 F.3d 802 (9th Cir.2001), Defendant maintain that 28 U.S.C. § 1367 confers supplemental jurisdiction over the remaining claim in this case only where the Court "has a hook of original jurisdiction on which to hang it." *Id.* at 805. The concept is simple enough – "supplemental jurisdiction cannot exist without original jurisdiction." *Id.*

Plaintiffs respond that their claims under the Employee Retirement Income Security Act of 1974 ("ERISA") against Defendants Desert Valley and Richard Manuli have never been dismissed, notwithstanding the fact that Defendants Desert Valley and Richard Manuli are no longer before the Court as a result of default judgments entered against them. Thus, argue Plaintiffs, given that 28 U.S.C. § 1367 provides for supplemental party jurisdiction, the only basis on which this Court may decline jurisdiction is provided by the discretionary provisions of 28 U.S.C. § 1367(c).

Federal courts are courts of limited jurisdiction. Although it does not appear that the United States Supreme Court has squarely addressed the question, the cases relied upon by Defendants support their argument that Article III does not permit the exercise of supplemental federal jurisdiction over Defendants who are not parties to the federal claim, under the particular circumstances presented here. *See Ayala v. U.S.*, 550 F. 2d 1196 (9th Cir. 1977); *Elsaas v. County of Placer*, 35 F.Supp.2d 757 (E.D.Ca.1999); and *EEOC v. Pacific Maritime Ass'n*, 2001 WL 725322 (D. Or.2001). Moreover, to the extent Plaintiffs are correct in their contention that this Court has only the option to consider declining supplemental jurisdiction under 28 U.S.C. § 1367(c), the Court concludes that in accord with 28 U.S.C. § 1367(c)(3), this Court should in fact exercise its discretion to decline jurisdiction in this case. While federal courts are required to address questions of state law in certain circumstances, it is the view of the Court that the exercise of supplemental jurisdiction should be rare when all federal claims have been dismissed before trial. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726-27 (1966). What remains here is a claim by

Plaintiff under state law which, in the judgment of this Court, properly belongs before a state court.

IT IS THEREFORE ORDERED that Defendants' Emergency Motion to Dismiss for Lack of Jurisdiction (#168) is granted.

DATED: January 4, 2002

/s/ Philip M. Pro
PHILIP M. PRO
United States District Judge